***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

DLB-WKM-JSC

6/25 1

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

975

No. 20,982

DOZIER V. HAZIEL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL IN FORMA PAUPERIS FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



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(Appointed by this Court)

## STATEMENT OF QUESTIONS PRESENTED

(1) Whether the procedural errors of the Juvenile Court, and the repeated trial continuances in the District Court, which resulted in a delay of one (1) full year between the adult co-defendant's trial on January 11, 1966, and defendant's trial on January 3, 1967, constitute a violation of defendant's right to a speedy trial provided by the Constitution's Sixth Amendment, and thereby requires reversal of defendant's conviction in the District Court and dismissal of the indictment against him?

(2) Whether the procedural errors of the Juvenile Court, namely that court's failure on two occasions to grant defendant a hearing prior to waiver of defendant to the District Court for trial as an adult, requires a remand to the Juvenile Court for a third waiver proceedings, including a hearing?

(3) Whether the procedural errors of the Juvenile Court require this Court to instruct the District Court, after proper waiver proceedings in the Juvenile Court, to resentence the defendant, giving the defendant such relief as this Court deems just in the circumstances?

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal in Forma Pauperis from an Order of the United States District Court for the District of Columbia.

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# BRIEF FOR APPELLANT

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## TABLE OF AUTHORITIES

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* Cases or authorities chiefly relied upon are marked by asterisks.

## CONSTITUTION AND STATUTES

## STATEMENT OF THE CASE

On September 2, 1965 defendant Dozier V. Haziel, a juvenile aged sixteen (16), was arrested, subsequently indicted and found guilty of robbery, and two counts of assault with a dangerous weapon. Defendant was sentenced to a term of eight (8) years under the provisions of the Federal Youth Corrections Act, Title 18, Section 5010(c) [18 U.S.C.A. §5010(c)]. Two co-defendants were Larry Wilkerson, an adult, aged eighteen (18), and Paul E. Matthews, a juvenile, aged seventeen (17).

The adult co-defendant Wilkerson was found guilty, after a trial severance, and sentenced under the Federal Youth Corrections Act, Title 18, Section 5010(b). Co-defendant Matthews was found not guilty when tried with the defendant, Haziel.

Defendant after his arrest was detained in the Receiving Home, but very soon thereafter was transferred to the D.C. Jail, where he remained for eleven (11) months. The Juvenile Court, then on September 21, 1965, without hearing, waived jurisdiction and transferred defendant to the District Court for trial as an adult. He was indicted on October 4, 1965 and arraigned on October 15, 1966.

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Jurisdictional Statement appears on page 14.

Trial was apparently set on November 30, 1965, but continued to January 11, 1966, "per assign. office". [The Criminal Docket contains no reference to the continuance of November 30, 1965, or even any mention that proceedings were held on that date. The information was taken from the notations on the jacket cover, which were presumably made by the courtroom clerk. Several other continuances of the trial date are similarly absent from the Criminal Docket. As they are referred to in this statement, they will be indicated by the identification (Ct. Clks. notation only)].

On December 3, 1965, defendant filed a motion for personal bond or reduction of bond. The bond was reduced to $2,500.00 on December 10, 1965, and defendant remained in the D.C. Jail.

Upon the oral motion of the Government on January 10, 1966, defendant was remanded to Juvenile Court jurisdiction, but it was not until January 28, 1966 that the order of remand was prepared and signed by the District Court. A delay of only a few days short of three weeks. On January 10, 1966, the adult co-defendant was granted a severance, tried on January 11, 1966, and found guilty as indicted.

A Writ of Habeas Corpus was filed in the District Court, pro se, by defendant for release in the custody of his parents, which was denied by the District Court on February 3, 1966.

After the District Court's remand, the record indicates it was not until March 15, 1966, another six-week delay, when counsel was appointed for defendant by the Juvenile Court. Counsel then waived the hearing in the Juvenile Court which formed the basic reason for the remand, just three (3) days later on March 18, 1966. The Juvenile Court then on May 11, 1966, a lapse of some two (2) months, for the second time waived jurisdiction over defendant for trial as an adult in the District Court.

A trial date for the defendant and the remaining co-defendant was presumably set for May 23, 1966, since on that date trial was again continued to June 23, 1966 "per Assign. Ofc." (Ct. Clks. notation only). Again on June 23, 1966 trial was continued to July 14, 1966, "case not reached; per Assign. Ofc." (Ct. Clks. notation only).

Defendant objected on June 23, 1966 to a further trial continuance and moved for a trial severance, which the court granted. The clerk's notation referring to the order said "Defendants severed for trial today" (Ct. Clks. notation only). The severance order, as noted by the clerk, is ambiguous since it can be interpreted to mean severance

for only June 23, 1966, or severance "today", on June 23, 1966, to apply to future trial action. The record is barren of any further reference to this severance, or action by the court, prosecutor or counsel in this regard.

To complete the picture, immediately after the second waiver by the Juvenile Court, a motion for personal bond was filed June 3, 1966, and denied June 10, 1966.

The parade of continuances did not come to a halt. On July 14, 1966, trial was continued to July 28, 1966 (Ct. Clks. notation only) "all counsel agreeable"; on July 20, 1966, a new trial date was shown as August 22, 1966 (Ct. Clks. notation only); and on July 25, 1966, the trial date was changed to September 7, 1966 (Ct. Clks. notation only) "at the request of defense counsel" without designating which one, or both.

An oral motion for release on personal bond was made by defendant on July 26, 1966, and on July 29, 1966 defendant was ordered released from the D.C. Jail after a period of eleven (11) months.

On the next day set for trial, September 7, 1966, the co-defendant made an oral request for a continuance, which was granted; and on October 3, 1966 the co-defendant again moved for a continuance, which was also granted.

On December 5, 1966, trial was again continued until December 21, 1966, and though the Criminal Docket is silent as to what action was taken on that date, the case was obviously continued to January 3, 1967, when at long last the trial commenced.

The jury returned a verdict of guilty as indicted against defendant, but found the co-defendant not guilty. On February 3, 1967, the court sentenced defendant to a period of sixty (60) days for observation and study pursuant to Section 5010(e), Federal Youth Corrections Act [Title 18, Section 5010(e), U.S.C.A.].

On April 21, 1967, defendant was sentenced to eight (8) years, under Section 5010(c) of the Federal Youth Corrections Act [Title 18, Section 5010(c), U.S.C.A.], from which sentence this appeal is taken. On the same date the court advised defendant of his right of appeal and after defendant indicated he wished to appeal, the court instructed the clerk to note the appeal. Defendant then filed an affidavit to be permitted to proceed in forma pauperis.

On May 10, 1967, the counsel representing defendant here was appointed, but it was not until February 28, 1968 that the original record was docketed in this Court.

## CONSTITUTION AND STATUTES INVOLVED

Amendment VI, Constitution of the United States.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, Section 5010.

* * * *

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017 (c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth

offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

*  *  *  *

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings. Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1085.

Title 28, Section 1291.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

## STATEMENT OF POINTS

(1) The delay of sixteen (16) months from the defendant's arrest, and fifteen (15) months from his arraignment, to trial, was caused by the failure of the Juvenile Court to grant defendant a hearing before waiving jurisdiction of defendant to the District Court for trial as an adult, and by a series of continuances granted by the District Court, because of calendar congestion and the co-defendant's motions for continuances.

(2) The denial of defendant's Constitutional guarantee of a speedy trial is emphasized by the fact a third co-defendant, an adult, was tried some three (3) months after arraignment and a year before defendant, and requires reversal of his conviction and dismissal of the indictment.

(3) The Juvenile Court's initial waiver of jurisdiction to the District Court was defective because the defendant was not granted a hearing. On remand, the Juvenile Court's second waiver was defective, again for failure to grant a hearing. A third chance for the Juvenile Court to correct its twofold error is now required.

(4) The frustrations and anxieties caused defendant by the delays resulting from the errors of the Juvenile Court, coupled with the eleven (11) months of incarceration

in the D.C. Jail, requires reconsideration of his sentence in the District Court, and for the District Court to take into consideration the resulting mental trauma and frustration, which contributed to his inability to accept the demands of society and prison, and allow defendant another chance to correct his past errors, as well as the Juvenile Court, so that he may now avail himself of the rehabilitative benefits of the Federal Youth Corrections Act.

## SUMMARY OF ARGUMENT

### I

Defendant's Constitutional right to a speedy trial, under the Sixth Amendment, was grossly abused by reason of the Juvenile Court's failure to follow the proper procedure and grant defendant a hearing before waiver of jurisdiction to the District Court, and by the repeated continuances caused by the calendar congestion in the District Court and the second co-defendant's oral motions for continuances. Defendant was tried sixteen (16) months after arrest, and fifteen (15) months after arraignment, and twelve (12) months after the adult co-defendant.

Defendant was arrested on September 2, 1965, and the Juvenile Court waived jurisdiction to the District Court

on September 21, 1965, without a hearing. Trial of defendant and the two co-defendants was set for January 11, 1966. On the Government's oral motion January 10, 1966, defendant's case was remanded to the Juvenile Court for a waiver hearing pursuant to this Court's opinion in Black v. United States (C.A. D.C., 1965) 122 U.S. App. D.C. 393, 355 F. 2d 104. At this turn of events, and to assure the adult co-defendant a speedy trial, the co-defendant's case was severed and his trial was held January 11, 1966. Defendant was not tried until January 3, 1967.

The Juvenile Court waived jurisdiction over defendant to the District Court for the second time on May 11, 1966, again without a hearing, and there then began a series of trial continuances which lasted until January 3, 1967. From the time of defendant's arrest until July 29, 1966, defendant was incarcerated in the D.C. Jail, unable to make bond, and having been denied personal bond by the court.

This Court's Hedgepeth v. United States (C.A. D.C., 1966) 124 U.S. App. D.C. 291, 364 F. 2d 684, and its second Hedgepeth v. United States (C.A. D.C., 1966) 125 U.S. App. D.C. 19, 365 F. 2d 952, and the Supreme Court's United States v. Ewell (1966) 383 U.S. 116, 15 L. ed 2d 627, emphasize that the length of incarceration prior to

trial is but one of several in determining whether a defendant was denied a speedy trial. We are instructed by those opinions that the total circumstances must be considered in order to reach a determination of the violation of this Sixth Amendment right.

The action of the court, or as here both the Juvenile and District Courts, is an important circumstance and is the sole reason defendant was tried one full year after the adult co-defendant. If the circumstances of the delays in the District Court can be ignored, as in King v. United States (C.A. D.C., 1959) 105 U.S. App. D.C. 192, 265 F. 2d 567, the procedural failure of the Juvenile Court should not, and cannot, be ignored, since it was the initial error causing defendant's trial delay. The justification for the delay in King (p. 569) "A method of disposition which reasonably accommodates the practicalities is not illegal", not only is distinguishable here on the basis of the longer period of incarceration before trial, but the fact that the defendant "suffered hardship from the delay" cannot be here denied. The reasoned dissent in King, though rejected there by the majority, finds application here, "where there has in fact been a substantial delay not of defendant's own choosing" (pp. 572-573) and "prejudice is presumed, or necessarily follows, from long delay" (p. 573) citing from United States v. Provoo (D.C. Md., 1955) 17 F.R.D. 183.

The circumstances of the delay in defendant's trial, patently violated defendant's Sixth Amendment right to a speedy trial, and requires, as found by the King dissent, that the conviction below be reversed and the indictment dismissed.

II

The Juvenile Court waived jurisdiction of defendant to the District Court for trial as an adult, without a hearing, and after this Court's Black v. United States (C.A. D.C., 1965) 122 U.S. App. D.C. 393, 355 F. 2d 104, the District Court remanded jurisdiction to the Juvenile Court for the hearing required by Black. Defendant's appointed counsel, improperly waived the hearing, and again, without holding a hearing, the Juvenile Court waived defendant to the District Court for trial.

This Court's Kent v. United States (C.A. D.C., 1964) 119 U.S. App. D.C. 378, 343 F. 2d 247, and the affirmance by the Supreme Court, (1966) 383 U.S. 541, 16 L. ed 2d 84, as well as the Black opinion, unequivocally require the Juvenile Court to conduct a hearing prior to waiving jurisdiction of a minor. In Re Gault (1967) U.S. , 18 L. ed 2d 527, the Supreme Court reiterated its previous Kent opinion, saying (p. 547), "there is no place in our

system of law for reaching of result of such tremendous consequences without ceremony - without hearing".

Because of the procedural errors of the Juvenile Court this Court has no alternative but to remand the case to the Juvenile Court to allow a third opportunity for that court to proceed in the proper manner. However, the remedy permitted that court does not cure the harm resulting to defendant. In Kent, the Supreme Court cautioned (p. 545), "unless appropriate due process of law is followed" the juvenile defendant "may not feel that he is being treated and may therefore resist the rehabilitative efforts of court personnel". As this Court said in Black (p. 107), when the juvenile is properly waived after remand, "the District Court should consider whether appellant suffered any prejudice" in that court "as the result of the invalid waiver and take all necessary steps to correct it".

Here, eleven (11) months in the D.C. Jail, the attendant frustrations, anxieties and concern caused by the procedural delays, should be taken into account by the District Court in considering correction of the prejudice suffered by defendant. The subsequent difficulties after his release on personal bond, and his confinement in Lorton, his failure to adjust properly in society and prison, can be said to be the direct result of defendant's

frustrations the feeling he was "unfairly treated" by the courts, causing his resistance to the "rehabilitative efforts" in his behalf. Any resentencing in the District Court must reflect these considerations.

## JURISDICTIONAL STATEMENT

Appellant brings this appeal, in forma pauperis, following his conviction and sentence in the United States District Court for the District of Columbia, Criminal No. 1121-65.

This Court has jurisdiction under Title 28, Section 1291, U.S.C.A.

## ARGUMENT I

## DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED BY A SERIES OF PROCEDURAL ERRORS WHICH REQUIRE REVERSAL OF DEFENDANT'S CONVICTION AND DISMISSAL OF THE INDICTMENT.

The various erroneous legal procedures evident here violated defendant's "right to a speedy trial", guaranteed by the Constitution's Sixth Amendment [United States Constitution, Amend. VI].

Both this Court and the Supreme Court have examined a defendant's right in a criminal case to a speedy trial under the requirements of the Sixth Amendment. It is not necessary to cite each of these numerous cases. 1/ This Court in Hedgepeth v. United States (C.A. D.C., 1966) 364 F. 2d 684, citing United States v. Ewell (1966) 383 U.S. 116, 15 L. ed 2d 627, succinctly states the factors involved in determining whether the Sixth Amendment's speedy trial guarantee has been violated. This Court noted that

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1/ These recent cases, as well as older decisions, may be found cited in Hedgepeth v. United States (C.A. D.C., 1966) 364 F. 2d 684; United States v. Ewell (1966) 383 U.S. 116, 15 L. ed 2d 627; and Klopfer v. North Carolina (1967) U.S. , 18 L. ed 2d 1.

each case must rest on its own facts, and said (p. 687):

> [T]he Sixth Amendment's guarantee of a speedy trial * * * is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.
>
> Whether a delay in bringing a defendant to trial results in a denial of his right to a speedy trial requires an analysis of the particular circumstances of each case. There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment. Time is but one factor, albeit the most important; the longer the time between arrest and trial, the heavier the burden of the Government in arguing that the right to a speedy trial has not been abridged. Other factors to be considered are the reasons for the delay, the diligence vel non of prosecutor, court, and defense counsel, and the liklihood, or at least reasonable possibility, that defendant has been prejudiced by the delay. (Emphasis supplied.)

Here there was a sixteen (16) months' delay, from September 2, 1965 to January 3, 1967, between defendant's arrest and trial. The trial delay, defendant's incarceration for eleven (11) months before release on personal bond,[2/] were the direct result of procedural errors and seeming

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2/ Defendant's motion for release on June 3, 1966, (denied on June 10, 1966) recites that though the bond premium was available, no bondsman would assume the bond, but on July 26, 1966 the District Court released defendant on personal bond after eleven (11) months in the D.C. Jail.

indifference to criminal defendants in the District and Juvenile Courts. The courts, assigned counsel, prosecutor, assignment commissioner, are each faced with what has been described as insurmountable problems of calendar congestion and the attendant breakdown of the desired "Utopia" in procedural criminal justice. King v. United States (C.A. D.C., 1959) 265 F. 2d 567. However, there is no justification for denying constitutional guarantees to criminal defendants on the grounds of the inability of responsible officials to cope with these ever increasing problems. The genesis of these problems is found in the social, economic and political atmosphere of this period, but the eroding of procedural criminal justice, whatever the cause, or the difficulties of solution, must not be allowed to desecrate our judicial heritage, or as here, deny that heritage to defendant.

The Juvenile Court's initial waiver of defendant to be tried as an adult on September 21, 1965, without the required hearing, was but the first in a series of procedural errors and delays. The District Court's order of remand of defendant to Juvenile Court on January 28, 1966, consistent with this Court's Black v. United States (C.A. D.C., 1965) 355 F. 2d 104, was the next intervening delay. The District Court granted remand on January 10, 1966, but

failed to sign the order of remand for eighteen (18) days. After remand, counsel was not appointed for defendant in Juvenile Court for over six (6) weeks, on March 15, 1966. Counsel then promptly, if erroneously, waived the hearing required by Black on March 18, 1966. Then, even though the Juvenile Court had before its first waiver, presumably after studied deliberation and judicial consideration determined defendant, then sixteen (16) years of age, should be tried in the District Court as an adult, did not order its second waiver until May 11, 1966, a period just short of two (2) months. It cannot be said that the Juvenile Court acted with promptness or dispatch, considering that no hearing was held and the facts forming the basis for its second waiver were, or should have been, considered and known by that court prior to the first waiver.

After the Juvenile Court's first waiver, indictment on October 4, 1965, and arraignment in the District Court on October 4, 1965, trial was set for November 30, 1965. Apparently it could not be reached due to calendar congestion because it was continued on that date to January 11, 1966 "per assignment office". After the Juvenile Court's second waiver, May 11, 1966, trial was set for May 23, 1966. On that date trial was again continued to June 23, 1966, "per assignment Ofc.", presumably because of calendar congestion.

On June 23, 1966, co-defendant "No. 3" [3/] requested a trial continuance. At this time defendant objected to a further continuance, and moved for a trial severance which had previously been granted to the adult defendant. The motion for severance was granted by the District Court. The clerk's notes state "Defendants severed for trial today". It must be agreed the court ordered severance of defendants, and that defendant Haziel was ordered tried on June 23, 1966. However, the trial date was again continued to July 14, 1966, "per Assign. Ofc.". On this occasion the reason noted was "case not reached" for trial.

From June 23, 1966 forward, the record reflects no consideration by the court, assignment commissioner, counsel or prosecutor, to the severance granted defendant on that date. Thereafter, on July 14, 1966, trial for both defendants was continued to July 28, 1966, all counsel being "agreeable", but no reason noted. Again on July 25, 1966, the clerk's notes show that defense counsel agreed to a continuance to September 7, 1966, but does not state which of the counsel. On September 7, 1966, the remaining co-defendant orally requested a continuance, which was granted,

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3/ There were three defendants, referred to in the record as "No. 1", "No. 2" and "No. 3". "No. 1", an adult was tried on January 11, 1966 and found guilty, just four (4) months after defendants were arrested. The appellant is "No. 2". "No. 3" also a juvenile was waived by and remanded to the Juvenile Court, as was appellant. Defendant "No. 3" was acquitted at trial.

and the case continued for trial until October 3, 1966 when again co-defendant requested, and was granted, a continuance. The trial was continued to December 5, 1966, on which date trial was again continued to December 21, 1966, but the record shows defendant was not brought to trial until January 3, 1967, sixteen (16) months after arrest, fifteen (15) months after arraignment.

If this Court does not share counsel's concern over the trial delay resulting from the Juvenile Court's procedural errors, and that court's failure to consider with reasonable promptness defendant's second waiver, the failure in the District Court to proceed with defendant's trial promptly after its severance order of June 23, 1966, patently denied defendant his right to a speedy trial.

In Hedgepeth v. United States (C.A. D.C., 1966) 365 F. 2d 952, a trial delay of fourteen (14) months was said to be "[n]ot so long as by itself to establish conclusively denial of a speedy trial"; however, the court concluded "it certainly is a long delay - unusually long for the District - and requires us to give close scrutiny to the other factors" (p. 954). In a separate appeal, resulting from a separate offense and trial, Hedgepeth v. United States (C.A. D.C., 1966) 364 F. 2d 684, the court referred to the "prima facie merit" of a contention of a

denial of a speedy trial "in view of the lapse of more than a year between appellant's arrest * * * and his trial" and conducted "a review of the intervening events" (p. 686). The sixteen (16) months between defendant's arrest and trial, fifteen (15) months after arraignment, presents the "prima facie merit", and a review of the "intervening facts" presents the valid basis for the conclusion defendant's right to a speedy trial was violated.

The "intervening events" here show no concern for defendant's right to a speedy trial, either by the Juvenile or District Court. If the Juvenile Court's first waiver had been procedurally proper, defendant would have gone to trial with the adult co-defendant on January 11, 1966, four (4) months after arrest, three (3) months after arraignment. If there had been a more prompt consideration of defendant's second waiver by the Juvenile Court, the trial perhaps could have taken place even before the date of the second waiver, three (3) months after the remand on January 28, 1966. If the District Court had complied with its own severance order of June 23, 1966, defendant's trial should have occurred promptly after that order. There appears to have been a total disregard of the severance

order after it had been granted.[4/]

This Court in King v. United States (C.A. D.C., 1959) 265 F. 2d 567, divided five to four, recognized imperfections in the District Court system of bringing criminal cases to trial denied some defendants a speedy trial. After reviewing the numerous causes for the delays, the majority found "no reversible error" because (p. 569):

> The problem here is to dispose of the present number of criminal cases through use of a reasonable amount of judicial machinery. A method of disposition which reasonably accommodates practicalities is not illegal. (Emphasis supplied.)

And further that (p. 569):

> The defendant's case was not prejudiced, even though he may have suffered hardship from the delay. (Emphasis supplied.)

The logic of the majority, which seems based solely upon practical considerations, was denied by the minority. The language of the dissent is even more appropriate here in view of the procedural imperfection greatly exceeding those of King. With reference to the requirements of the Sixth Amendment, the dissenters said (pp. 572-573):

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4/ The statement of the court in King, infra, that "of course, a motion to advance that date of trial was always available" (p. 570) would appear to be an empty suggestion here, when the severance "for trial today", on defendant's motion, was futile.

> * * * the application of that amendment, providing that "the accused shall enjoy the right to a speedy * * * trial," does not turn on the question of responsibility. Even if no agency or instrumentality of the Government is responsible for the delay, where there has in fact been a substantial delay not of the defendant's own choosing - i.e., where he has not waived his right to a speedy trial - there has in law been a denial of a speedy trial.

And further that (p. 573):

> The right to a speedy trial guaranteed by that amendment means a trial without "delays manufactured by the ministers of justice." Black, Constitutional Law § 266, quoted in United States v. Provoo, 17 F.R.D. 183, 197 (D.C.D.Md. 1955), affirmed 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed.761 (1955).

The dissent in King rejected the majorities conclusion of lack of prejudice caused by the trial delay, stating (p. 573):

> * * * I read in appellant's brief clear allegations of prejudice - not only the obvious and very serious prejudice that he was kept in jail for months without trial to suit the convenienve of others, but also the probable prejudice resulting from the effect of delay upon the memories of witnesses and their willingness to testify. Moreover, I agree with the conclusion in Provoo, supra, that "prejudice is presumed, or necessarily follows, from long delay" and that this is true a fortiori when the defendant is imprisoned during the delay. 17 F.R.D. at page 203.

This conclusion of the dissent is consistent with the recent opinion by the Supreme Court in United States v. Ewell

(1966) 383 U.S. 116, 15 L. ed 2d 627, where defining the protections of the Sixth Amendment, the court said (p. 120):

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.

Here the prejudice was twofold. At the outset it is without question, that eleven (11) months in the D.C. Jail, before release on bond, was more than the mere "hardship" referred to in King. It must be classified as "undue and oppressive incarceration prior to trial", and must have caused defendant; "anxiety and concern".

During trial, the Government's principal witness, testifying on both direct and cross (Tr. pp. 17-98; 317-326) could not remember or was uncertain on some twenty-three (23) occasions.[5/] The two other principal witnesses were more exact (Tr. pp. 98-128; 170-198) but it must be assumed they were younger, more retentive, and had been refreshed by

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5/ Leon Halbmillion, the Government's principal witness, stated he did not remember, or words to that effect, in response to numerous questions directed to him (Tr. pp. 29, 34, 40, 44, 45, 47, 49, 53, 54, 57, 69, 71, 72, 73, 74, 92, 94 and 322). On one occasion the witness testified "I really don't know now because it was more than a year ago," (Tr. p. 53), and again, "I'm telling you its so long ago I remember absolutely nothing about this case" (Tr. p. 72).

being witnesses against the adult co-defendant on January 11, 1966.

The conclusion of the dissenters in King, based on the facts present here, must be applied. There, "in the full circumstances of [King's] direct appeal from the conviction", four members of this Court urged (p. 573):

> * * * not only that the conviction should be reversed but also that the indictment should be dismissed under the provisions of Rule 48 (b), Fed.R.Crim.P., authorizing dismissal "if there is unnecessary delay in bringing a defendant to trial * * * ."

## ARGUMENT II

## THE JUVENILE COURT FAILED ON TWO OCCASIONS TO PROPERLY WAIVE JURISDICTION OF DEFENDANT, WHICH NOW REQUIRES REMAND BY THIS COURT FOR A THIRD WAIVER PROCEEDINGS AND JUDICIAL RELIEF FOR DEFENDANT.

Initially it is without question that between the Juvenile and the District Courts for the District of Columbia defendant became a legalistic and involuntary player in a comedy of errors. Defendant was arrested on September 2, 1965. On September 21, 1965, without a hearing,[6/] the Juvenile

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6/ The record is barren of any evidence defendant was represented by counsel at the time of the first waiver by the Juvenile Court.

Court waived jurisdiction and ordered the defendant held for action as an adult in the District Court. Defendant was subsequently indicted on October 4, 1965, and remained in jail pending trial.[7/] Though a co-defendant, Larry Wilkerson (Criminal No. 1121-65) was tried by jury January 11, 1966, defendant was not brought to trial at that time. Instead, and as a direct result of the opinion of this Court in Black v. United States (C.A. D.C., 1965) 122 U.S. App. D.C. 393, 355 F. 2d 104, the District Court on January 23, 1966 remanded defendant to the Juvenile Court for further action consistent with that opinion.

On March 15, 1966, the Juvenile Court appointed counsel who three days later, on March 18, 1966 by letter, advised the court:

> * * * I have reviewed the files of your Court and find no basis for requesting a hearing or further consideration relative to a waiver to the United States District Court for the District of Columbia.

The record is barren of any evidence that counsel, prior to his waiver of hearing in the Juvenile Court, requested

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7/ Within a few days of defendant's arrest on September 2, 1965, he was transferred from the Receiving Home to the D.C. Jail. He remained so incarcerated for almost eleven (11) months, unable to raise the necessary bail bond, until July 29, 1966 when he was released on personal bond.

"to meet with the Judge making the determination in an informal conference" as suggested by the March 15, 1966 letter of appointment.[8/] If, as hereinafter discussed, a Juvenile Court must hold a hearing before waiving a minor to be tried as an adult, it follows counsel may not waive the minor's right to that hearing. This Court said in Black, citing the prior Kent v. United States (C.A. D.C., 1964) 119 U.S. App. D.C. 378, 343 F. 2d 247, 258, counsel's duty is "to present to the court anything on behalf of the child which might help the court in arriving at a decision * * * ". To permit counsel to waive a hearing would permit counsel to exercise the duty and discretion of the Juvenile Court judge, who is vested "primarily and initially" with the authority to determine if the minor should be tried as an adult (Black, p. 107).

We are not advised as to what actions occurred in the Juvenile Court between March 15, 1966 and May 11, 1966, but we are advised that the Juvenile Court on May 11, 1966, again without a hearing, waived jurisdiction of the defendant and referred the defendant to the District Court for

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8/ There is no intent or desire here to criticize appointed counsel's actions. It is the system which defendant complains against. Counsel had been appointed to represent defendant in the District Court after the Juvenile Court's first waiver and represented at the time of the District Court's remand to the Juvenile Court.

trial as an adult. What appointed counsel, or even defendant, could have urged a hearing on the waiver, which might have changed the decision of the Juvenile Court, is here not material. The issue is that there was no hearing and defendant's rights were prejudiced, because as this Court said in Black v. United States (p. 107):

> But the waiver question was primarily and initially one for the Juvenile Court to decide and its failure to do so in a valid manner cannot be said to be harmless error. (Emphasis supplied.)

Black v. United States was affirmed by the Supreme Court in Kent v. United States (1966) 383 U.S. 541, 16 L. ed 2d 84, where the Court said:

> It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile.

In Re Gault (1967) U.S. , 18 L. ed 2d 527, the Court citing its Kent v. United States reiterated the requirement that before waiver of a juvenile to be tried as an adult there must be a hearing, saying (p. 547):

> In Kent v. United States, supra, we stated that the Juvenile Court Judge's exercise of the power of the State as parens patriae was not unlimited. We said that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." With respect to the waiver by the juvenile

> court to the adult of jurisdiction over an offense committee by a youth, we said that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony - without hearing, without effective assistance of counsel, without a statement of reasons." (Emphasis supplied.)

It must be conceded that the Juvenile Court failed to hold a hearing before waiving jurisdiction of defendant on either September 21, 1965 or May 11, 1966, and that such failure "cannot be said to be harmless error" (Black v. United States, pp. 106-107). Yet what remedy is available to correct this error? Defendant is now eighteen (18) years of age and serving an eight (8) year sentence under the Federal Youth Corrections Act. In addition, he is serving a sentence of one (1) year, to run concurrently with the instant sentence, for carrying a dangerous weapon,[9/] and an additional sentence of ninety (90) days, to run consecutively, for escaping from the Lorton Reformatory.[10/] Under these circumstances it seems certain the Juvenile Court, upon remand, will hold a hearing which will be but an exercise in futility, and defendant will for the third time be waived to the District Court.

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9/ United States v. Haziel (D.C. D.C., Nov. 3, 1967) Criminal No. 205-67.

10/ United States v. Haziel (D.C. N.D. Va., Oct. 16, 1967) Criminal No. 4538.

In Black v. United States, this Court determined that (p. 107):

> If appellant is not waived on remand, then the indictment in the District Court must be dismissed. On the other hand, if appellant is waived, the District Court should consider whether appellant suffered any prejudice in the District Court as a result of the invalid waiver and take all necessary steps to correct it. (Emphasis supplied.)

From the record it appears a "properly conducted waiver proceedings upon remand", as contemplated by Black, will not deal with the events occurring after the first two waivers, and will "not disclose information, hitherto unknown to the District Court" (p. 107). However, the District Court, upon direction from this Court, could reconsider the sentence imposed of eight (8) years under the Federal Youth Corrections Act, Title 18, Section 5010(e) [18 U.S.C.A. §5010(e)], weighing the consequences of the procedural errors upon defendant's failure to adjust to public and prison environment.

Should this Court order a remand to the Juvenile Court it will be giving that court a third opportunity to purge itself of past errors. Should this Court be less lenient with the defendant? At the least, the District Court should be instructed to reconsider defendant's

sentence, taking into account the fact defendant's obvious frustrations and depression subsequent to September 2, 1965. These frustrations and depression can be accounted for in part upon the failures of the Juvenile Court to correctly follow the "appropriate due process of law", so that defendant did "not feel that he [was] being fairly treated and may therefore resist[ed] the rehabilitative efforts" of the prison authorities (Kent, p. 545).

It must also be remembered that **from soon after** September 2, 1965 until July 29, 1966, plaintiff was incarcerated because, as set forth in his Writ of Habeas Corpus which was denied February 3, 1966, his age and lack of assets prevented his release on bond. One of the co-defendants, Larry Wilkerson, an adult, was tried in early January 1966, but defendant remained in the District of Columbia Jail for seven (7) additional months before he was finally released on personal bond. We are not advised whether this period of time in the Jail was considered by the District Court at the time of sentence. However, it is necessary to consider whether this period of time in jail, while the Juvenile Court twice considered waiver, increased defendant's rebellion to authority and rehabilitation. There could have been no other result. This

result was envisioned by the Supreme Court in Kent, when it observed, citing Juvenile Delinquency - Its Prevention and Control, by sociologists Wheeler and Cottrell (p. 545):

> For example, in a recent study, the sociologist Wheeler and Cottrell observe that when the procedural laxness of the "parens patriae" attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel." (Emphasis supplied.)

## CONCLUSION

For the reasons heretofore set forth, it is urged that defendant's conviction in the District Court be reversed, and the indictment dismissed or, in the alternative, that the case be remanded to the Juvenile Court so that a proper waiver proceeding be held and that the District Court be instructed to resentence defendant, taking into consideration the entire circumstances involved herein.

Respectfully submitted,

/s/ Harold H. Bacon

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Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

BRIEF AND APPENDIX FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,982

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DOZIER V. HAZIEL, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
CAROL GARFIEL,
WILLIAM G. REYNOLDS, JR.,
*Assistant United States Attorneys.*

Cr. No. 1121-65

## QUESTIONS PRESENTED

1) Was appellant denied his constitutional right to a speedy trial by reason of a series of continuances totaling sixteen months from arrest until trial when—

a) almost all the delay was caused by 1) appellant's case being sent back to Juvenile Court for more waiver proceedings pursuant to *Black* v. *United States*, 122 U.S. App. D.C. 393, 355 F.2d 104 (1965); 2) the congested court calendar in District Court and the priority given in that court to cases in which the accused is in jail; 3) requests for continuances by appellant or his co-defendant.

b) appellant was on personal bond in this case for approximately five months preceding his trial.

c) appellant does not contend that he was materially prejudiced in presenting his defense or that any of the delay was attributable to purposeful, arbitrary, or capricious action by the Government or the court.

d) appellant did not contend in any of the proceedings below that his right to a speedy trial was denied.

2) Was appellant improperly waived by the Juvenile Court when—

a) appellant's lawyer after making a full study of the files informed the court that a formal waiver hearing would be pointless.

b) there is no evidence that appellant's lawyer did not have access to all the information regarding appellant that he needed and wanted.

c) the Juvenile Court stated in writing its reasons for waiving appellant and in doing so demonstrated that it considered the full background of the case including appellant's prior unresponsiveness to rehabilitative efforts.

# INDEX



## TABLE OF CASES

## OTHER REFERENCES



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* Cases chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,982

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DOZIER V. HAZIEL, APPELLANT

*v.*

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF AND APPENDIX FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

Appellant, Dozier V. Haziel, was indicted along with Larry J. Wilkerson and Paul E. Matthews on October 4, 1965 for robbery [1] and two counts of assault with a dangerous weapon.[2] On January 3, 1967 the appellant and Paul E. Matthews went to trial before Judge William B. Jones and a jury. On January 5, 1967 appellant was found guilty as indicted. On February 3, 1967 appellant

[1] 22 D.C. Code § 2901.

[2] 22 D.C. Code § 502.

was committed to the custody of the Attorney General pursuant to the provisions of the Youth Corrections Act for a period of sixty (60) days for observation and study.[3] On April 21, 1967 appellant was again committed to the custody of the Attorney General under the Youth Corrections Act for a period not to exceed eight (8) years.[4] This appeal followed:

**Precedings Before Trial**[5]

On September 2, 1965 at approximately two o'clock in the afternoon the Friendly Corner Market at 1103 Mount Olive Road, N.W. was held up. Several hundred dollars in cash and money order forms were stolen from the store. In the course of the holdup, the store owner, Mr. Leon Halbmillion was shot in the back by one of the holdup men. A few minutes after the holdup, appellant was arrested and identified by Mr. Halbmillion as the holdup man who shot him in the back.

Appellant and Paul Matthews, were charged in the Juvenile Court with armed robbery and assault with intent to kill. A waiver study was initiated and appellant was sent to the District Columbia Receiving Home pending Court action. Appellant was subsequently transferred to the District of Columbia jail because the Receiving Home was having great difficulty handling him. (See Order waiving Dozier V. Haziel, Jr. as to Certain Offenses, May 10, 1966.) On September 21, 1965 the Juvenile Court waived jurisdiction over appellant.

On October 4, 1965 appellant was indicted in the United States District Court for the District of Columbia for Robbery (Count 1) and Assault with a Dangerous Weapon (Counts 2 and 3). On October 14, 1965 he pled not guilty

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[3] 18 U.S.C. § 5010(e).

[4] 18 U.S.C. § 5010(c).

[5] As an aid to understanding the pre-trial history of this case, an appendix has been prepared detailing that history. The information in this appendix was gleaned from the jacket and docket entries included in the record on appeal.

to the indictment and requested a jury trial. On December 10, 1965 appellant's bond was reduced from $5,000 to $2,500. On January 10, 1966 the Government moved with no objection to remand appellant's case to the Juvenile Court for a new waiver proceedings in view of this Court's decision in *(Larry O.) Black* v. *United States*, 122 U.S. App. D.C. 393, 355 F.2d 104 (1965), decided on December 8, 1965. On March 18, 1966 Mr. John J. Dwyer, Esquire who had been appointed to represent the appellant in the Juvenile Court informed Chief Judge Morris Miller of the Juvenile Court that after reviewing the files of the case he "could find no basis for requesting a hearing or further consideration relative to a waiver to the United States District Court for the District of Columbia". (See Letter, John J. Dwyer, to Chief Judge Morris Miller, March 18, 1966.) On May 11, 1966 the Juvenile Court again waived jurisdiction of the appellant. In its order waiving jurisdiction the Juvenile Court specifically set out the reasons for its waiver of the appellant including his extensive involvement in crime as a juvenile and the fact that appellant's prior exposure to the facilities available to the Juvenile Court had had no significant rehabilitative impact on him. The Court concluded that there was no reasonable prospect of rehabilitating the appellant by the use of the facilities available to the Juvenile Court.

On June 10, 1966 appellant through his attorney moved to be released on his personal bond but his motion was denied by Judge Curran. On June 23, 1966 appellant and Paul Matthews were called to trial on this case, but Paul Matthews had several motions (for discovery and inspection) still pending. When appellant objected to a continuance, Chief Judge McGuire severed his case from Paul Matthews for a trial that day. However, the case never got to trial due to the congested calendar and was continued until July 14, 1966. On July 14, 1966 the case was continued again at the agreement of appellant's counsel as well as counsel for Paul Matthews and counsel for the Government. On September 7, 1966 the case was

called for trial before Judge Sirica. Counsel for Paul Matthews moved for a continuance. This motion was granted without objection from either appellant or the Government. On December 5, 1966 the case was again continued. On January 3, 1967 appellant and Paul Matthews went to trial together before Judge William B. Jones and a jury. Appellant was convicted on all charges, and Paul Matthews was acquitted. Appellant never moved to dismiss the indictments for want of a speedy trial during any of the aforementioned proceedings.

**The Trial**

The Government's evidence at trial was presented primarily through these witnesses: Mr. Halbmillion, the owner of the Friendly Corner Market, Messrs. Richard Harris and Larry Pyles who were employees of the Friendly Corner Market and were eyewitnesses to the holdup, and several police officers who assisted in the apprehension and arrest of the appellant.

This evidence disclosed that on September 2, 1965 at approximately two o'clock in the afternoon Mr. Halbmillion was in the Friendly Corner Market with two of his employees, Richard Harris and Larry Pyles. Appellant, Dozier Haziel entered the store along with Larry Wilkerson.[6] Appellant waved a pistol at Richard Harris and Larry Pyles who were behind the meat counter. (Tr. 101.) Mr. Harris and Mr. Pyles then came out from behind the meat counter with their hands up (Tr. 20, 101). Appellant then pointed his gun at Mr. Halbmillion who was standing behind the counter next to the cash register (Tr. 19). Larry Wilkerson went behind the counter and removed approximately two hunderd eighty-nine dollars ($289) in cash and money orders from the cash register

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[6] Wilkerson who was an adult at the time of the crime was indicted along with appellant. But when the cases of appellant and Paul Matthews were remanded back to the Juvenile Court, Wilkerson's case was severed from theirs and he was convicted on January 11, 1966.

(Tr. 20). Appellant then directed Richard Harris and Larry Pyles to lie on the floor (Tr. 102). When Wilkerson had finished taking the money from the cash register, Mr. Halbmillion picked up the phone to call the police (Tr. 21). At this time appellant shot Mr. Halbmillion in the back (Tr. 21, 26). Mr. Halbmillion, Larry Pyles and Richard Harris all positively identified the appellant as the robber with the gun (Tr. 26, 103-04, 172). Larry Pyles and Richard Harris testified that they had seen appellant on other occasions prior to September 2, 1965 (Tr. 107, 176).

Private Reed of the Metropolitan Police Department assigned to the 11th Precinct testified that he was off duty in his private automobile on the afternoon of September 2, 1965 when he heard a shot coming from the direction of the Friendly Corner Market (Tr. 135). He observed Mr. Halbmillion standing outside the store with a gun in his hand and bleeding from his back (Tr. 135-36). Mr. Halbmillion gave officer Reed a brief description of the robbers and told him which direction they went (Tr. 137-39). Paul Matthews pointed out appellant and Larry Wilkerson who were crossing Montello Avenue. When Officer Reed got out of his car, appellant jumped a small fence in the rear of 1213 Penn Street and hid under a porch. Appellant was arrested and taken back to the scene of the robbery where he was positively identified by Halbmillion, Richard Harris and Larry Pyles (Tr. 142, 203). A raincoat and an automatic pistol were recovered in an alley in the vicinity of the location where appellant and Larry Wilkerson were arrested (Tr. 220-221).

Four hundred and thirty dollars in bills, a number of money order blanks and some papers with Mr. Halbmillion's name on them were recovered in the raincoat (Tr. 232, 233).

### Appellant's Defense

Appellant's defense, presented primarily through his own testimony, was that he was walking through an alley in the rear of Montello Avenue on his way home when

he heard two shots. Soon thereafter when he saw a man in a car who later identified himself as Private Reed, he ran underneath a porch and hid (Tr. 282). He was then arrested and taken to the Friendly Corner Market. Although appellant had previously confessed to this offense while in custody (Tr. 275) he denied the offense at trial. The Government did not attempt to use the earlier confession.

## CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

Amendment VI, Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 5010:

* * * *

> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or
>
> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise pro-

vided by law, sentence the youth offender to the custody of the attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

* * * *

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings. Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1085.

Title 28, Section 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

Rule 23(c), Juvenile Court Rules:

1. By timely notice to the Clerk of the Court, counsel for the juvenile may request an informal hearing before the Judge making the waiver decision. In order to be timely, a request for hearing must be filed within five days from date of the notice to counsel that the Court is considering waiver.

2. The juvenile and his parents, guardian or custodian shall be present. A Court reporter shall be present and shall take notes of the hearing.

3. Counsel may have summoned to the hearing, for purposes of questioning, those persons designated by

him, who have provided information relevant to the waiver decision, except that the Court may direct that counsel's questioning of said persons be subjected to such reasonable conditions as will insure the protection of goals basic to the Juvenile Court Act. Lists of persons to be summoned, subpoenaed or notified must be submitted to the Clerk of the Court as diligently as possible but in no event less than ten days prior to the scheduled date of the hearing.

## SUMMARY OF ARGUMENT

### I

Appellant is not entitled to reversal of his conviction on speedy trial grounds. Almost all the delay in this case was caused by: 1) appellant's case being remanded back to Juvenile Court for new waiver proceedings under *Black* v. *United States*, 122 U.S. App. D.C. 393, 355 F.2d 104 (1965), which was decided while appellant was awaiting trial in the District Court; 2) the congested court calendar in District Court; 3) requested continuances by appellant or by appellant's co-defendant with no objection from appellant. Appellant does not contend that the delay in any way prejudiced his ability to defend himself at trial. Moreover there was a total absence of purposeful, arbitrary, vexatious or oppressive action on the part of those charged with bringing appellant to trial. Appellant did not move to dismiss the indictment for want of a speedy trial below. Whether or not this notable silence constitutes a waiver, it certainly indicates that appellant and his counsel did not feel that his right to a speedy trial had been denied until after his conviction.

### II

Appellant was properly waived by the Juvenile Court on May 11, 1966. After appellant's case was remanded to the Juvenile Court pursuant to *Black* v. *United States*, *supra*, the Juvenile Court appointed counsel to represent appellant. This counsel after a study of the files informed

the court that there was no need for a formal waiver hearing. The Juvenile Court after a full study of the background and facts of the case waived the appellant to the District Court. The Juvenile Court accompanied its order waiving appellant with a list of the reasons which motivated the waiver. These reasons included the seriousness of the crime, appellant's bad record as a juvenile, and appellant's failure to respond to prior rehabilitation efforts by the Juvenile Court. Appellant does not contend that he was denied the *opportunity* to have a formal waiver hearing or that a new waiver hearing would produce a different result. Instead, appellant asks this court to change the law and require a waiver hearing as a matter of law even as here when appellant's counsel after studying the background of the case is satisfied that the court has all the information it needs to decide the waiver question and that a formal hearing would not benefit his client. Such an inflexible rule is not the law and should not be the law. Moreover, appellant never objected to the waiver proceedings until this appeal.

## ARGUMENT

### I. Appellant was not denied his constitutional right to a speedy trial.

Appellant argues for the first time on this appeal that the delay which resulted almost entirely from the congested court calendar and from his case being remanded back to the Juvenile Court for a more thorough waiver study effective denied him the right to a speedy trial under the Sixth Amendment. In making this argument appellant does not contend that this delay materially prejudiced him in presenting a defense, or that the delay was caused by purposeful or vexatious conduct by the prosecutor or the court. Instead, appellant bases his argument on his interpretation of the position of the dissent in *King* v. *United States*, 105 U.S. App. D.C. 192, 265 F.2d 567, *cert. denied*, 359 U.S. 998 (1959); that speedy trial means a trial without "delays manufactured by the minister of justice." Appellants Brief at 23.

This Court has recently stated that there is "no touchstone of time" to determine when an accused constitutional right to a speedy trial has been violated. *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 294, 364 F.2d 684, 687 (1966). The right is necessarily relative and is consistent with delays and depends on circumstances. *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1965); *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). In evaluating the circumstances of a case to determine whether an accused right has been violated this Court has consistently adhered to the test of *Smith* v. *United States*, 118 U.S. App. D.C. 38, 41, 331 F.2d 784, 787 (1964) *(en banc)*: "the balance between the rights of public justice and those of the accused has been upset against the Government only where the delay has been arbitrary, purposeful, oppressive or vexatious." *(Maurice) Evans* v. *United States*, D.C. Cir. No. 20,480, slip opinion May 8, 1968; *(Connie) Wilkins* v. *United States*, D.C. Cir. No. 20,676, slip opinion April 11, 1968. While as this Court noted in *Hanrahan* v. *United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965), there may be delays of such magnitude (e.g. twenty years) as to be *ipso facto* a violation of the Sixth Amendment's guarantee of a speedy trial, a delay of approximately sixteen months caused by the unusual circumstances in this case does not even approach that dimension. Thus, when, as here, there is an absence of unnecessary delay attributable to the Government and/or actual prejudice to the ability of the accused to defend himself at trial, the Supreme Court and this Court have consistently refused to overturn cases which the total time from arrest to trial was much longer than in the present case. See *United States* v. *Ewell*, 383 U.S. 116 (1966); *Tynan et al.* v. *United States*, 126 U.S. App. D.C. 206, 376 F.2d 761, *cert. denied*, 389 U.S. 845 (1967). Moreover, in *Marshall* v. *United States*, 119 U.S. App. D.C. 83, 337 F.2d 119 (1964) and *Williams* v. *United States*, 102 U.S. App. D.C. 51, 250 F.2d 19 (1957), each involving delays plus incarceration several times greater than in this case (forty-three months in *Marshall* and

approximately seven years in *Williams*), this Court reversed only after a detailed analysis of the record convinced it of the existence of *both* unnecessary delay attributable to the Government and actual prejudice to the ability of the accused to defend himself at trial. An analysis of the circumstances of this case in view of the standards announced in the *Smith* and *Hedgepeth* cases, *supra* does not provide support for appellant's contention that his Sixth Amendment right had been denied.

In this case the total elapsed time between arrest and trial was approximately sixteen months. Appellant was arrested on September 2, 1965 a short time after he allegedly shot Mr. Halbmillion in the back in the course of the holdup. Within one month and two days of his arrest, appellant had been waived by the Juvenile Court and indicted on the present charges. On December 8, 1965 while appellant, Larry Wilkerson and Paul Matthews were awaiting trial on these charges this Court held in *Black* v. *United States*, *supra*, that the assistance of counsel was necessary at a waiver hearing. On January 10, 1966, approximately three months after appellant was indicted, the District Court on motion of the Government and with no objection from the appellant followed this Court's suggestion in *Black*, remanded the case for reconsideration of the question of waiver.[7]

Mr. John J. Dwyer, Esquire who was appellant's counsel in the District Court proceedings was appointed to represent the appellant in the Juvenile Court. On March 18, 1966 Mr. Dwyer by a letter which is part of the record informed Chief Judge Miller of the Juvenile Court that after reviewing the files he "could find no basis for requesting a hearing or further consideration relative to a waiver to the United States District Court for the District of Columbia. (See Letter, John J. Dwyer, to Chief

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[7] On this day the case of Larry Wilkerson the adult defendant who was arrested along with appellant was severed from appellant's case. Wilkerson went to trial the next day, January 11, 1966 and was convicted as charged under the indictment.

Judge Miller.) On May 11, 1966 Judge Miller issued an order waiving appellant to the District Court for the second time and listing the reasons for his decision to waive the appellant.

As of this point, approximately eight months had passed since appellant's arrest. That part of the delay which was not ordinary and inevitable was a product of the need for remand under *Black* and the Juvenile Court's setting up of new procedures for waiver under *Kent* v. *United States*, 383 U.S. 541 (1966).[8] Therefore, the primary cause of the first seven months of delay in this case, as in *United States* v. *Ewell*, *supra*, was a change in the law first promulgated subsequent to the initiation of proceedings against appellant. This change in law was promulgated to assure that appellant was represented by counsel during the critical waiver proceedings. Appellant does not contend that any of this delay was requested or secured by the Government in order to achieve a real or supposed advantage. See *Hanrahan* v. *United States*, *supra*; *United States* v. *Provoo*, 17 F.R.D. 183 (D. Md.) *aff'd* 350 U.S. 857 (1955).

The remainder of the delay totaling less than seven months was primarily attributable either to the congested court calendar or the priority given especially during the summer months to cases in which defendants had been unable to secure pre-trial release, a practice implicitly approved by the majority in *King* v. *United States*, *supra*, or to continuances requested by the co-defendant Paul

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[8] The Juvenile Court Jacket which is part of this record indicates that Mr. Dwyer was informed by the court of the summary conference procedures governing lawyer participation in waiver proceeding on March 15, 1966. On March 11, 1966 Mr. Dwyer inspected the court files relevant to appellant. On March 18, 1966 Mr. Dwyer by letter waived the opportunity to participate in further waiver proceedings. On April 4, 1966 the Juvenile Court wrote Mr. Dwyer informing him of the new procedures under Rule 23 of the Juvenile Court Rules for Lawyer participation in waiver proceedings. On April 20, 1966 Mr. Dwyer informed the court by telephone that he was standing by his position stated in his letter of March 18. At this time the court was in a position to decide the waiver question.

Matthews without any objection from appellant.[9] Of this seven month period after his second waiver appellant was out on personal bond for five months. None of the delay after this second waiver was requested by the Government.

In conclusion, appellant has not made out a case for violation of his Sixth Amendment right to a speedy trial. He does not claim actual prejudice in defending himself. He does not claim that any of the delay was caused by purposeful arbitrary or capricious action on the part of the Government or the court to achieve a real or supposed advantage. In fact, almost none of the delay was requested or attributable to the Government. Indeed, appellant never made an effort to assert his Sixth Amendment right to a speedy trial until this appeal. Whether or not this notable silence below amounts to a waiver, it certainly indicates that appellant did not feel that he was prejudiced.

**II. Appellant was properly waived by the Juvenile Court on May 11, 1966.**

Appellant argues for the first time on this appeal that his attorney was precluded by recent court decisions from waiving a formal waiver hearing in Juvenile Court even after a full study of the files had convinced him that the Court had all the information it needed to decide the waiver question and that further proceedings would be useless. This argument is based on a misreading of this Court's opinion in *Black* v. *United States*, *supra* and the opinions of the Supreme Court in *Kent* v. *United States*, 383 U.S. 541 (1966), and *Re Gault*, —— U.S. ——, 18 L.Ed.2d 527 (1967).

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[9] Only once did appellant object to a continuance that was on June 23, 1966 when Paul Matthews asked for a continuance because the court had not acted on certain motions which he had filed. The court severed appellant's case from that of Matthews for a trial that day. However, appellant did not get to trial that day because his case was not reached. Three weeks later on July 14, 1966 appellant concented to another continuance. He also requested or concented to continuances on July 25, 1966, September 7, 1966 and October 3, 1966.

In *Black* v. *United States*, *supra*, this Court held that the waiver of jurisdiction by the Juvenile Court is a "critically important" action in which the juvenile is entitled to be represented by counsel. Here, it is not contested that appellant was represented by counsel before he was waived on May 11th, and that counsel had access to any files in the custody of the court which he might want to use in the waiver proceedings. In *Kent* v. *United States*, 383 U.S. 541, 561 (1966), the Supreme Court held among other things that a juvenile was entitled to the *opportunity* for a hearing which may be informal prior to the entry of a waiver order, and that the Juvenile Court was required to give a statement of its reasons for waiving the defendant. Here, appellant does not contend that he was denied opportunity to have a formal or informal hearing. Appellant certainly had the opportunity to have a waiver hearing as does any defendant who was waived from the D.C. Juvenile Court subsequent to the *Kent* decision. See Rule 23(c) of Juvenile Court of the District of Columbia. However, it is clear from his letter of March 18, 1966 that appellant's counsel concluded after studying the relevant files that a formal waiver hearing would serve no useful purpose for his client. Thus, he decided not to avail himself of the opportunity to have a hearing in this case. The *Kent* decision does not stand for the proposition that appellant by his counsel could not waive a formal hearing when he was satisfied after reviewing the files that the court had all the relevant information at hand and that a formal hearing would be useless.[10] Moreover, the Juvenile Court in this case stated in writing its reasons for waiving appellant as required by the *Kent* decision. Indeed it is notable that some of the reasons which motivated the Juvenile Court to waive the appellant in this case are similar to those the Supreme

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[10] Appellant does not contend on appeal that information favorable to appellant was not brought to the attention of the Juvenile Court. Indeed, he admits that if the case was remanded again for further waiver proceedings, the result would be the same. Appellant's Brief at p. 29.

Court in its Appendix to *Kent* v. *United States*, 383 U.S. at 565 (1966) endorsed as the proper determinative factors which the Juvenile Court should weigh in deciding the waiver question. For example:

a) Whether offense was committed in an aggressive, violent, premeditated or willful manner. Here, there is no doubt appellant's act of holding up the store and shooting the owner in the back falls within this category.
b) Whether the offense was against person or property with greater weight being given to offenses against persons especially if personal injury results. Here, appellant committed a serious crime against person and property in which personal injury resulted.
c) Whether the defendant is likely to be indicted. Here appellant was indicted and convicted.
d) The defendant's record and previous history as a juvenile. Here, the court considered appellant's bad record and listed it as a reason for waiver.
e) The likelihood of rehabilitation. Here the court noted that appellant's prior exposure to the facilities available to the juvenile court had no rehabilitative impact on him and that there was no reasonable prospect of rehabilitating the appellant by the use of the facilities available to the juvenile Court.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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# APPENDIX

## APPENDIX

| Court Dates | Duration of Continuance | Requested by or Attributable to | Reason for Continuance |
|---|---|---|---|
| September 2, 1965 | 3 weeks (approx) | Juvenile Court | Appellant arrested. |
| September 21, 1965 | 3 weeks (approx) | Government | Appellant waived by Juvenile Court. |
| October 15, 1965 | 6 weeks (approx) | Government | Arraignment—appellant plead not guilty. Indictment was returned on October 4, 1965. |
| November 30, 1965 | 6 weeks (approx) | Court | Case continued by Assignment Office. |
| January 10, 1966 | 4 months (approx) | Juvenile Court—Time required to act on appellant's case after remand pursuant to new court cases. An entire new procedure had to be set up in the Juvenile Court after a flood of remands. | Oral motion by the Government to remand case to Juvenile Court for proper waiver proceedings pursuant to *Black* v. *United States*, 122 U.S. App. D.C. 393, 355 F.2d 104 (1965). Motion granted with no objection by appellant. Case of Larry Wilkerson, the adult defendant, was severed from appellant's case. Wilkerson was tried and found guilty the next day. |
| May 11, 1966 | 2 weeks (approx) | | Appellant waived again by Juvenile Court pursuant to new procedures. |
| May 23, 1966 | 1 month (approx) | Court | Continued by Assignment Office. |

| Court Dates | Duration of Continuance | Requested by or Attributable to | Reason for Continuance |
|---|---|---|---|
| June 23, 1966 | 3 weeks (approx) | Court | Case called for trial. Paul Matthews was not ready for trial because certain motions he had filed had not yet been acted on yet. Therefore the Court granted appellant a severance for trial on this date. However the case was apparently not reached because no judge was free. |
| July 14, 1966 | two weeks (approx) | All parties | Appellant, Paul Matthews, and the Government agree to a continuance. |
| July 25, 1966 | two weeks (approx) | Defense Counsel | The record is not clear if this continuance was requested by appellant's counsel or Paul Matthews' counsel. There was no objection from any party. |
| September 7, 1966 | one month (approx) | Defense Counsel | Counsel for Paul Matthews moved for a continuance. No objection from appellant. |
| October 3, 1966 | one month | Defense Counsel | Counsel for Paul Matthews moved for a continuance. No objection from appellant. |
| December 5, 1966 | one month | Court | |
| January 3, 1967 | | | Appellant tried and convicted. |



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